IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 419
5409817

	BETWEEN	DR VIVIENNE TATE Applicant
	A N D	THE MARIANNE CAUGHEY SMITH-PRESTON MEMORIAL REST HOMES TRUST BOARD Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Linda Hughes, Counsel for Applicant Jenni-Maree Trotman, Counsel for Respondent
Submissions Received:	From the respondent on 30 August 2013 From the applicant on 10 September 2013
Date of Determination:	16 September 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The applicant, Dr Vivienne Tate is ordered to contribute $5500 towards the legal costs of the respondent, The Marianne Caughey Smith- Preston Memorial Rest Homes Trust Board.

[1] In a substantive determination dated 20 August 2013[1] the Authority determined the applicant was an independent contractor to the respondent, she was not an employee.

[2] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

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1 [2013] NZERA Auckland 371

[3] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2]. Those principles are so well recognised I do not need to restate them.

[4] The general principles in *Da Cruz* are that costs follow the event, without prejudice offers can be taken in to account and costs awards are modest.

[5] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*[3] observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[6] Ms Trotman seeks an uplift in the daily rate because attempts were made by the respondent to settle the matter prior to the investigation meeting in the Authority. Ms Trotman submits that the respondent made a *Calderbank*[4] offer, that is a without prejudice save as to costs offer to the applicant. The offer was made by the respondent in a letter dated 19 March 2013 ("the Offer") which is before the Authority. Ms Trotman submits the Offer should be taken into account by the Authority when determining costs because it was made at an early stage of the proceedings, was a genuine attempt to resolve the matter without further expenditure on litigation and was ignored by the applicant.

[7] Ms Hughes resists the uplift in costs sought by Ms Trotman. Ms Hughes submits the *Calderbank* offer was not limited to the preliminary matter for determination by the Authority as to whether the applicant was an independent contractor or an employee, but sought to settle "all matters" between the parties. Ms Hughes further submits that the offer was for a minimal amount of $2500. These two factors, Ms Hughes submits do not justify a departure by the Authority from adopting a notional daily tariff in respect of costs.

[8] It is not unusual for an offer of settlement to be made in order to resolve all matters before the Authority and this is what occurred in this case. The applicant did not attempt to negotiate the Offer as was open to her, it was ignored.

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2 [2005] 1 ERNZ 808.
3 [2011] NZEmpC 13
4 *Calderbank v Calderbank* [1976] Fam 93 (CA)

[9] Ms Hughes further submits that the respondent's conduct in withdrawing from the disputes resolution process after Arbitrators and Mediators Institute of New Zealand (AMINZ) had appointed an independent referee to deal with the commercial dispute between the parties, forced the applicant to seek redress in another forum and that the Authority was the appropriate forum. The Authority is the forum for the determination of employment related disputes, it has no jurisdiction to determine commercial disputes as in this case. The applicant was aware of this. The applicant invoked the disputes resolution process in her independent contract and agreed to the appointment of an independent referee by AMINZ. This in my view was because she was aware this was the appropriate method by which her dispute was to be resolved and determined. It was only when the respondent withdrew from the disputes resolution process that the applicant brought her claim to the Authority. The applicant's decision to do so did not appear to be based on the grounds of appropriate jurisdiction.

[10] The applicant was wholly unsuccessful in her claim before the Authority, the Offer was a genuine attempt by the respondent to resolve the matter without further expenditure on litigation and was made at an early stage in the proceedings. Ms Trotman seeks the actual costs incurred by the respondent totalling $10,956.00 plus GST.

[11] The normal starting point for costs in the Authority is $3,500 per day, *Fifita (aka Bloomfield) v. Dunedin Casinos Limited*[5].

[12] This matter involved an investigation meeting of 1 full day. I have adopted a notional daily tariff of $3,500 as my starting point. I now consider whether notional tariff should be adjusted.

[13] As mentioned, the applicant ignored the Offer made more than 4 months prior to the Authority investigation meeting, made a decision to bring her claim to the Authority despite it being commercial in nature and the subject of a another disputes resolution process. Further, the applicant was wholly unsuccessful in her claim before the Authority.

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5 [2012] NZEA Christchurch at p.2019

[14] Taking these factors into account, the actual costs incurred by the respondent and the principle that costs awards are to be modest and not to be used as a form of punishment, I consider the notional rate should be increased by $2,000.

[15] Accordingly, the applicant is ordered to pay the respondent $5,500 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Anna Fitzgibbon
Member of the Employment Relations Authority